

IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA

Supreme Court No. 20050394
District Court No. 5007

TERRY L. JOHNSON,

Plaintiff/Appellant and,
Cross-Appellee,

vs.

THOMAS E. GEHINGER,

Defendant/Appellee and.
Cross-Appellant.

Appeal and Cross-Appeal from a Final Judgment entered by the District Court for Renville County, Northeast Judicial District, State of North Dakota. The Honorable Lester Ketterling presiding.

APPELLEE'S/CROSS-APPELLANT'S BRIEF

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I. STATEMENT OF THE FACTS

The Appellant's Statement of Facts is acceptable as far as it goes. Though adverted to in the argument section of the brief, Mr. Johnson fails to highlight the fact that the "non-competition" clause at issue in this contempt case was stipulated to by the parties in the course of resolving the underlying litigation. Transcript (Tr.) 32:5-22. Specifically, Mr. Johnson had initially hoped the stipulation would include a bar to competition for a period of ten years. Id. This was found to be unacceptable and, in the end, the three year term was consented to by both Mr. Johnson and Mr. Gehringer. Id.

During the contempt hearing, Mr. Johnson himself testified that the lines of business engaged in by Propane Services at the time of the breakup were these: (1) bulk propane sales and delivery; (2) residential and commercial heating system installation; (3) residential and commercial air conditioning system installation; and (4) both repair and service with regard to (2) and (3), supra. Tr. 23:13-25.

Mr. Johnson also freely admitted he, during the time the non-competition agreement was in effect, and despite its language, engaged, for profit, in (2), (3), and (4), all within forty miles of Mohall, North Dakota. Tr. 24:20-25:15.

Mr. Gehringer's testimony largely corroborated Mr. Johnson's. Tr. 42:11-17; 43:10-14. He indicated his understanding was the non-competition clause not only precluded Mr. Johnson from engaging in the sales and delivery of bulk propane, but also enjoined him from installing, repairing, or servicing heating and/or air conditioning systems in either residential or commercial structures within a forty mile radius of Mohall. Tr. 44:6-16.

II. ARGUMENT

A. The District Court did not Err in Finding That Johnson Violated the Court Order and was in Contempt of Court.

1. Standard of Review.

A trial court's determination as to whether or not a party is in contempt is reviewed only for a "plain abuse of discretion." Bergstrom v. Bergstrom, 320 N.W.2d 119, 121 (N.D. 1982) (citing Brierly v. Brierly, 431 A.2d 410 (R.I. 1981)). "On appeal, we determine if the trial court's Order of Contempt was remedial or punitive, and whether in issuing the Order, the dictates of N.D.C.C. § 27-10-01.3 were followed.¹

¹ All agree the contempt in this case was remedial, or civil, in nature. The procedure employed as well as the sanctions imposed confirm this is so. See Endersbe v. Endersbe, 555 N.W.2d 580, 582 (N.D. 1996); N.D.C.C. §§ 27-10-01.3(1) & 27-10-01.4(1). See also Appendix (Ax.) pgs. 25-27 (Memorandum and Order for Contempt).

2. Findings of Fact are not Required When Issuing an Order for Contempt.

Mr. Johnson begins his argument by indicating the contempt order entered by the trial court was improper because the “trial court made no finding that there was a willful or inexcusable intent...to violate the Court order” and because “the Court did not make any finding that Johnson’s conduct was an intentional disobedience...of the Court....” Appellant’s Brief (Ap. Br.) pgs. 5-6.

This argument is easily disposed of. Findings and conclusions made by a trial court are discussed in North Dakota Rule of Civil Procedure 52. That Rule states: “Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule.”² N.D.R.Civ. P. 52(a).

Therefore, the presence or absence of findings in the trial court’s Order for Contempt is inapposite to the problem at hand.

² Civil Rule 52(c) concerns findings to be made when, during the course of a bench trial, a case is adjudicated piecemeal. N.D.R.Civ. P. 52(c). It has no bearing on the issue before this Court.

Berg v. Berg, 2000 ND 36, 606 N.W.2d 895, cited by the Appellant in support of his position, is not to the contrary. The proposition set forth in that opinion is well known law. The rule, however, applies to the findings and conclusions that must be made prior to entering a Judgment. Id. at ¶ 1, 606 N.W.2d 895. The result in Berg, of course, is dictated by Civil Rule 52 itself, N.D.R.Civ. P. 52(a), as well as by the statutory scheme governing the specialized proceeding in that matter. See Berg, 2000 ND 36, ¶ 9; N.D.C.C. § 14-05-22.

Berg does not bear upon what must occur prior to the entry of an Order for Contempt. This Court should, therefore, disregard this portion of the Appellant's argument.

3. **The Trial Court did not Abuse its Discretion in Finding Mr. Johnson in Contempt.**

The matter of findings of fact being a non-issue, the only remaining question is whether the trial judge abused his discretion in finding Mr. Johnson in contempt of court. See Bergstrom, 320 N.W.2d at 121. The answer to that question is “no.”

As noted by the Appellant, the term “contempt of court” has two definitions relevant to this appeal. Ap. Br. pg. 5. First, contempt may consist of “[i]ntentional disobedience, resistance, or obstruction of the authority, process, or order of a court or other officer including a referee or magistrate.” N.D.C.C. 27-10-01.1(1)(c). It may also occur by way of “[a]ny other act or omission specified in the Court rules or by law as a ground for contempt of court. N.D.C.C. 27-10-01.1(1)(g).

The record below contains ample evidence supporting the finding of contempt such that it could not have been an abuse of discretion. As previously discussed, Mr. Johnson testified he was aware of the existence of the non-competition clause and was aware of the lines of work being engaged in by Propane Services at the time the clause became effective. Tr. 32:5-22; 23:13-25. He was also very clear the he engaged in those lines of work during the non-competition period and within a forty-mile radius of Mohall, North Dakota. Tr. 24:20-25:15.

There is no question the trial court could infer intentional disobedience of the non-competition clause on Mr. Johnson's part when faced with this evidence. Once intentional disobedience of a valid court order exists, there is no abuse of discretion in finding contempt and the imposition of a remedial sanction. See N.D.C.C. §§ 27-10-01.1(1)(c) & 27-10-01.2(1)(any court of record may impose a remedial sanction for contempt of court).

The Appellant cites Anchor Estates, Inc. v. State, 466 N.W.2d 111 (N.D. 1991), for the contrary proposition. Ap. Br. pg. 6. There, the trial court found the relevant judgment too "unclear" such that no contempt finding could be based on it. Anchor Estates, 466 N.W.2d at 113. This Court found no abuse of discretion in such a determination. Id.

Conversely, the trial court here necessarily found the non-competition portion of the amended judgment sufficient to support an Order for Contempt. Mr. Johnson briefly argues the clause was "ambiguous" and, thus, too imprecise for the imposition of sanctions. Ap. Br. pg. 6. However, this reasoning ignores the testimony of Mr. Gehringer which was to the effect the meaning of the clause was well known to the parties and very definitely intended. Tr. 44:6-45:17. Again, and for these reasons, there was no abuse of discretion in the trial court's finding of contempt on Mr. Johnson's part.

B. The District Court did not Err in Assessing Damages.

As an alternative argument, Mr. Johnson asserts the trial court erred in its remedial damages calculation. Ap. Br. pg. 7. No error is present.

When a contempt of court causes damages, the amount need not be determined to a mathematical certainty. Robin Wood, Inc. v. Woods, 815 F.Supp. 856, 869 (W.D. Pa. 1992)(citing Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931)). It is enough if the evidence shows the extent of damages as a matter of just and reasonable inference, even though, in the end, the result is only an approximation. Id.

As noted by Mr. Johnson, evidence was produced at the hearing to the effect that the types of violations of the non-competition clause made up five-percent of the total business of Propane Services. Tr. 28:10-15. The trial court, therefore, imposed a sanction equal to five-percent of the total purchase price paid for the business by Mr. Gehringer. Ax. pgs. 11 & 27.

Such reasoning, without a doubt, involves a “just and reasonable inference” amply supported by the evidence such that the determination is completely appropriate. Therefore, this Court should allow the remedial damages calculation to stand.

C. The Cross-Appeal is Being Dismissed.

After having reviewed the Appellant's arguments on appeal. Mr. Gehringer, the Appellee and Cross-appellant, has elected to file a Motion to Dismiss his Cross-appeal pursuant to North Dakota Rule of Appellate Procedure 42. The parties have agreed to dismiss the cross-appeal, each to bear their own costs and fees.

III. CONCLUSION

The trial court's Order for Contempt should be allowed to stand in all respects.

Dated this 27th day of April, 2006.

Ss// James G. Wolff

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Thomas E. Gehringer

**CERTIFICATE OF ELECTRONIC FILING AND ELECTRONIC
SERVICE**

I certify that on the 27th day of April, 2006, I transmitted, via electronic mail, the foregoing Appellee's/Cross-appellant's Brief in Adobe Portable Document Format and directed the document to:

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